Gold Shield Security and Investigations, Inc. *and* Allied International Union. Cases 29–CA–14955 and 29–RC–7619

January 15, 1992

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On June 19, 1991, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with this Decision.

The judge found that the Respondent violated Section 8(a)(1) of the Act on three separate occasions. We agree. The judge also found that the Respondent's conduct on the last occasion, the only objectionable conduct occurring within the critical period, warranted setting aside the election. We disagree.

In mid-May 1990, William Weinig, the Respondent's vice president, telephoned employee Bruce Batalitzky at his worksite and asked him not to talk to any union representatives. We agree with the judge that this constituted an 8(a)(1) violation. There is no evidence, however, that Weinig's instruction to Batalitzky was overheard by or disseminated to any other of the more than 60 employees eligible to vote in the June 22, 1990 election. In these circumstances, we find that the conduct is isolated and did not affect the results of the election. See *Caron International*, 246 NLRB 1120 (1979). Accordingly, we find that the election conducted on June 22, 1990, was valid and that a certification of results of election should issue.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Gold Shield Security and Investigations, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Allied International Union and that it is not the exclusive representative of these bargaining unit employees.

James Kearns, Esq., for the General Counsel.
Jonathan P. Arfa, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on April 8, 1991, in Brooklyn, New York. The complaint which issued on August 29, 1990,[1] was based on an unfair labor practice charge filed on June 27 by Allied International Union (the Union). The complaint alleges 11 incidents of 8(a)(1) conduct by Respondent in mid-May and one incident on June 22; most of these allegations involve activities by John Konior and William Weinig, Respondent's president and vice president, and admitted agents of Respondent.

On September 10 the Regional Director for Region 29 of the Board issued a report on objections, order consolidating cases and notice of hearing. This report states that an election was conducted on June 22 in a unit consisting of all full-time and regular part-time security officers employed by the Employer-Respondent, excluding all other employees, office clerical employees, and supervisors as defined in the Act. The tally of ballots showed the following:

Number of votes cast for the Petitioner-Union.....7
Number of votes cast against Petitioner-Union.....43
Number of challenged ballots.....11

Challenges were not sufficient to affect the results of the election. On June 27 the Petitioner filed timely objections to conduct affecting the results of the election. Objection 3 is as follows: ''The employer threatened that certain individuals will be discharged if they vote in the election . . . .'' The Regional Director found that as Objection 3 involves the same conduct as is alleged in the complaint herein, the cases should be consolidated for hearing.

On the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with its principal office located in Brooklyn, New York, is engaged in providing security services to various enterprises. Annually, in the course and conduct of its business operations, Respondent performs security services valued in excess of $50,000 in States other than the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

As stated, there are numerous 8(a)(1) allegations consolidated with Objection 3 in the instant matter; however, General Counsel called only two witnesses, Edward Oquendo

[1] Unless indicated otherwise, all dates referred to relate to the year 1990.

and Bruce Batalitzky, who testified to five instances of alleged 8(a)(1) conduct. Two of these instances involved Konior, and one involved Weinig. The remaining two incidents involved Salvatore Rasulo, alleged to be a supervisor, and Charlie Miller, alleged to be the head supervisor. Respondent called no witnesses to rebut General Counsel's case.

The petition was filed on April 27; the Stipulated Election Agreement was entered into by Respondent and the Union on May 21 and the election was conducted on June 22. Oquendo, who was employed by Respondent as a security guard from February to the end of May, testified that: ''I think around May, no, April,'' on a Monday, Konior called the worksite where he and his partner, Andy Yarnette, were then working: ''He asked us if we heard anything about the union and I said no, at that time.'' Konior asked Oquendo if a ''union guy'' was around. Oquendo asked why, and Konior said that they were signing petitions. Oquendo said that he hadn't seen him. Konior then said that he wanted to see Oquendo and Yarnette in his office. About 3 days later (on Thursday) they went to Konior's office where they met with him and Weinig. Konior said that if the union people came to their worksite they should not let them on the premises; he also said that the Union was a ripoff and they only wanted the employees' money; he had been a policeman and was a member of the union, but he never received a pension. Konior then said that if they joined the Union and went on strike, ''that we would lose our jobs and he would change the name of the company and hire new workers.'' Oquendo and Yarnette said that he couldn't do that and Konior said that he could do anything since it was his company.

That evening, while they were at work, Rasulo came to their worksite and asked them why Konior had them come to the office. They told him what Konior had said, that he said ''that he could change the company.'' Rasulo said: ''He could do anything he wants. That's his company.'' At about 8 p.m. that day Miller called their worksite; he told them that he had also retired and never received a union pension. They then told Miller what Konior had said about changing the company name and hiring new employees if they went on strike; Miller said: ''Yes, he could do that. He could do anything he wants with his business. All he would have to do is move his location from where he is at there, and move to another one and just change the name.'' Yarnette then got on the phone and Oquendo heard him tell Miller that the Union would be good for their families because it would give them benefits. When Oquendo got back on the phone with Miller, Miller told him that before they signed to join the Union they should think about their families.

Batalitzsky testified that in early to mid-May Weinig called him at his worksite and said not to talk to the union representative, and if he showed up at the worksite to ask him to leave. He answered: ''Okay.''

As there are allegations regarding statements made by Rasulo and Miller, it is necessary to determine their supervisory status.

Oquendo testified that Rasulo was a supervisor: ''He would come in the evening to check up once a day on us. He would see how we were doing, and he would sign his name on the book, and then he would leave.'' On occasions when a guard called Oquendo to say that he would not appear for work at Oquendo's worksite (whether for the same shift or the next shift), Oquendo would use a beeper to contact either Rasulo or Miller; on these occasions Rasulo ''would say wait down until I bring somebody to come in.'' On those occasions when Oquendo was sick and could not report for work he called Konior or Weinig. Batalitzsky testified that Konior and Weinig gave him his work assignments and one of them came to his worksite each morning ''to see if everything was all right.'' Rasulo came to his worksite twice a day: ''He basically went around checking the sites to make sure everything was all right. He would stop, make sure everything was okay, sign the log book.''

Oquendo testified that Miller was the head supervisor; he ''stays in the office through the night. He sometimes, once in a blue moon, would stop by the sites.'' When he comes to the sites: ''He sees how we are doing and sometime he will write his name on the book and sometime he won't. And then he just checks up on us and he leaves.'' If a supervisor (presumably Rasulo) cannot make it to a worksite, Miller will, at times, go there in his place. When Oquendo has called him to tell him that a guard did not appear for work at the site, Miller, at times, brings a replacement guard to the site. On occasion, individuals whom Oquendo did not know came to the worksite and said that they were standby employees; on these occasions Oquendo called Miller to verify their employment.

IV. ANALYSIS

It is initially alleged that Rasulo and Miller are supervisors within the meaning of Section 2(11) of the Act. The testimony establishes that Rasulo had the title ''supervisor'' and Miller was the ''head supervisor''; however, job titles do not a supervisor make. *Omnix International Corp.*, 286 NLRB 425 (1987), and *Bowne of Houston*, 280 NLRB 1222 (1986), where the Board stated: ''The proper consideration is whether the functions, duties and authority of an individual, regardless of title, meet any of the criteria for supervisory status defined in Section 2(11) of the Act.'' The burden of proving that an individual is a statutory supervisor rests on the party alleging that such status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). I find that General Counsel has not sustained that burden. Section 2(11) is phrased in the disjunctive so the individual need possess only one of the enumerated powers to be a supervisor under the Act. *NLRB v. Ohio Power Co.*, 176 F.2d 385 (6th Cir. 1949). There is clearly no evidence that Rasulo or Miller can hire, fire, promote or reward employees, either on their own or effectively recommend such. The question therefore is whether they can responsibly direct the employees in such a manner as requires the use of independent judgment.

The evidence establishes that Rasulo goes to the jobsites once or twice a day, looks over the area, and signs his name to the logbook. On those occasions that a guard did not appear for work, Rasulo brought a replacement to the jobsite. As there is no evidence that this involved responsible direction of work requiring the use of independent judgment, I find that General Counsel has failed to establish that Rasulo is a supervisor within the meaning of the Act. There is also no evidence that Miller exercises supervisory authority as defined in the Act. The evidence establishes that he spends most of his time in Respondent's office during the nightime hours and rarely goes to the jobsites. When he does, ''he sees how we are doing'' and, at times, signs the logbook.

Like Rasulo, he sometimes brings a replacement guard to the jobsite. I therefore find that the evidence fails to establish that Miller is a supervisor within the meaning of the Act.

In April (or possibly May), as will be discussed more fully below, Konior called Oquendo's jobsite and asked him if he had heard anything about the Union and he said that he hadn't. Konior asked if the ''Union guy'' was around and Oquendo said that he hadn't seen him. There is no evidence that Oquendo was an active and open union supporter or that he and Konior had a friendly relationship. Konior was the president of Respondent and Respondent established no valid reasons for the questioning. For example if there was credible evidence that union representatives were on the premises of the Respondent's customers, without authorization, that could be a valid reason for Konior's questions. His questions to Oquendo were not phrased in that manner, however. I therefore find that under the totality of circumstances test set forth by the Board in *Rossmore House*, 269 NLRB 1176 (1984), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1986), Konior's questioning of Oquendo violates Section 8(a)(1) of the Act. When Oquendo and Yarnette went to Konior's office 3 days later, Konior said that if the union people came to his worksite they should not let them on the premises. Oquendo testified that Respondent's policy is that only people with proper identification are allowed on premises that Respondent's guards are protecting. This statement was therefore a lawful reiteration of Respondent's rule. However, Konior then told them that if they joined the Union and went on strike they would lose their jobs and he would change the name of the Company and hire new workers. When they protested that he couldn't do that, Konior said that he could do anything since it was his company. Although Konior could have lawfully informed Oquendo and Yarnette of their right to strike and his corresponding right to hire strike replacements, he instead said that if they went on strike they would lose their jobs and he would change the company name and hire new employees; since it was his company, he could do anything he wanted. This goes way beyond his free speech right and intrudes upon the employees' right to engage in Section 7 activity without fear of reprisals. This threat therefore violates Section 8(a)(1) of the Act.

The sole remaining allegation (covered in par. 17 of the complaint) is Batalitzsky's testimony that in about early May, Weinig called him at the jobsite and said not to talk to the union representative and if he showed up at the jobsite to ask him to leave. The second part of this statement was clearly lawful as a reiteration of Respondent's rule against unauthorized individuals being on the property Respondent's guards were protecting. However, the first part of Weinig's statement to Batalitzsky violates Section 8(a)(1) of the Act as it was made by Respondent's vice president, without any apparent valid reason, and there was no evidence that Batalitzsky was an open and active union supporter, or that he and Weinig had an open and friendly relationship.

Turning to the objections, the only specific objection remaining is Objection 3, which alleges that Respondent threatened to discharge employees if they voted in the election. There is no evidence to support this objection. However, the Regional Director, in his report on objections, order consolidating cases, states that in his investigation of the objections and the unfair labor practice charge subsequently filed by the Union, numerous other allegations were uncovered which became the basis for the complaint which issued on August 29. The law is clear that such allegations may serve as the basis for setting aside an election even when they were not specifically alleged in the Union's objections filed within 7 days of the election. *American Safety Equipment*, 234 NLRB 501 (1978); *Burns Security Services*, 256 NLRB 959 (1981), and *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). However, to serve as a basis for setting aside an election such conduct must have occurred between the date the petition was filed, April 27, and the date that the election was conducted, June 22. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1962).

Oquendo testified that Konior called him at the jobsite on a Monday afternoon: ''I think around May, no, April.'' He and Yarnette went to Konior's office, as directed, on Thursday, 3 days later: ''I think it was . . . April.'' The conduct alleged constitutes grounds for setting aside the election; the question is whether it occurred during the critical period. The final day in April 1990 was April 30, a Monday. For both the Monday telephone call and the Thursday office meeting to have occurred in April, as Oquendo testified, the latest that it could have occurred was April 23 and 26, prior to the petition having been filed. General Counsel has not sustained his burden of establishing that the activity occurred during the critical period and I therefore recommend that it be overruled. *Operating Engineers Local 295–295C (Weather Wise)*, 282 NLRB 273 (1986).

Batalitzsky testified that Weinig called him and told him not to talk to the union representatives and to ask them to leave if they appear at the jobsite. I have previously found that Weinig's warning to Batalitzsky not to talk to the union representatives violates Section 8(a)(1) of the Act. The remaining issue therefore is whether it occurred within the critical period and therefore constitutes conduct which would overturn the results of the election. Batalitzsky testified that he worked for Respondent until about 2 weeks before the election (which took place on June 22) and that he received the phone call from Weinig: ''A few weeks before I left.'' That would place the call in about mid-May, clearly within the critical period. I therefore sustain this objection.

V. THE EFFECT OF SUCH CONDUCT ON THE ELECTION

Having sustained the objection regarding Weinig's statement to Batalitzsky, I will recommend that the election conducted on June 22 be set aside.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act in the following manner.

(a) Interrogating employees about their union activities.

(b) Threatening to terminate its employees due to their protected concerted activities.

(c) Directing its employees not to engage in union or other protected concerted activities.

4. The Respondent did not further violate the Act as also alleged in the complaint.

5. The Respondent's unlawful conduct interfered with the representation election conducted on June 22, 1990.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, to wit, the posting of the notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Gold Shield Security and Investigations, Inc., Brooklyn New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union activity.

(b) Threatening to terminate its employees due to their protected concerted activities.

(c) Directing its employees not to engage in union or other protected concerted activities.

(d) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Brooklyn, New York location copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted on June 22, 1990, in Case 29–RC–7619 be set aside and a new election be held at such time as the Regional Director of Region 29 decides that the circumstances permit the free choice of a bargaining representative.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees regarding activities on behalf of Allied International Union (the Union) or any other labor organization.

WE WILL NOT threaten our employees with discharge for striking or engaging in other protected concerted activity.

WE WILL NOT direct our employees to refrain from engaging in activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guranteed you by Section 7 of the Act.

GOLD SHIELD SECURITY AND INVESTIGATION, INC.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''